133-206

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886

No. 1025. ~~1168~~ 95.

THE UNITED STATES, APPELLANT,

vs.

CHARLES C. WATERS.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 27, 1886.

SUPREME COURT OF THE UNITED STATES.

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THE UNITED STATES, APPELLANT,

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1 In the United States Court of Claims.

CHARLES C. WATERS
vs.
THE UNITED STATES. } No. 14541.

I.—*Petition.*—*Filed February* 18, 1885.—*J. R.*

To the honorable judges of the Court of Claims:

Your petitioner, Charles C. Waters, a citizen of the United States, and a resident of Little Rock, in the State of Arkansas, respectfully shows:

That for six years previous to the filing of this petition he has been a United States district attorney for the eastern district of Arkansas, duly qualified, and is still acting as said attorney.

That section 824 of the Revised Statutes of the United States provides that "when an indictment for crime is tried before a jury, and a conviction is had, a district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars;" that under this provision of law your petitioner charged in his accounts for services within six years last past in various cases when an indictment for crime was tried before a jury, and a conviction had, a counsel fee of thirty dollars; that said accounts and charges were duly approved by the court, as required by law, and were duly presented to the accounting officers of the United States Treasury for payment; that the accounting officers disal-

2 lowed in the settlement of these accounts a part of the counsel fee of thirty dollars charged in the various cases as aforesaid, amounting in all to three hundred and twenty dollars.

Petitioner claims that, in accordance with the provisions of section 824 of the Revised Statutes of the United States, he is entitled to be paid by the United States a counsel fee of thirty dollars in each case when an indictment for crime is tried before a jury and a conviction is had, and when said counsel fee has been approved and allowed by the court; and though his accounts therefor have been duly presented to the accounting officers of the Treasury for payment of said counsel fee of thirty dollars, only a part of the same has been paid, and although payment of the balance has been repeatedly demanded, yet no part of the same has been paid to him, nor to any one for him, nor has any part of the same been allowed to him in any way as a credit or set-off by any officer or Department of the United States; but, on the contrary, allowance and payment thereof has been refused, although his accounts therefor were duly presented to and approved by said court, in accordance with law.

Your petitioner further shows that no assignment or transfer of said claim, or any part thereof, has been made by him, and that he is the lawful owner thereof, and that he has at all times borne true allegiance to the Government of the United States, and not in any way voluntarily aided or abetted or given encouragement to rebellion against said Government.

Wherefore your petitioner prays judgment against the defendant for three hundred and twenty dollars, with interest at six per cent. per annum.

CHARLES C. WATERS,
By his attorney, C. C. LANCASTER.

DISTRICT OF COLUMBIA:

Before me, A. S. Taylor, a notary public in and for the District
3 of Columbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney duly executed by said petitioner and filed herewith to verify said petition; and petitioner is justly entitled to the amount therein claimed from the United States after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES C. LANCASTER.

Subscribed and sworn to before me this 18th day of February, 1885.
[SEAL.] A. S. TAYLOR,
Notary Public.

Petitioner's post-office address is Little Rock, Arkansas.

4 II.—*General traverse.*—*Filed March* 16, 1886.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

5 *Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant was United States district attorney for the eastern district of Arkansas for the six years immediately preceding the date of his petition.

II.

During said period of time there were twenty-two indictments for crimes tried by him before a jury, and a conviction had in each cause.

The court before whom said causes were tried made an order allowing him $30 counsel fee in each of said causes in addition to the attorney's fees otherwise provided for (Rev. Stats., 824).

III.

The claimant from time to time rendered his accounts for money payable out of the Treasury of the United States, with the vouchers and items thereof, to the circuit or district court, as required by Revised Statutes, sections 833, 846, and the act of February 22, 1875 (ch. 95, sec. 1; Supplement to Rev. Stat., 145), including therein twenty-two items, each specifically stated to be "$30 counsel fee allowed by court," and the accounts were approved by the court.

IV.

Said accounts so approved were forwarded to the accounting officers of the Treasury, as required by law, by whom they were submitted to the Attorney-General for his supervision (Rev. Stats., 368). The Attorney-General thereupon reduced the amount of said allowances, as follows: $10 in five, $15 in fourteen, and $20 in three of the cases, thus reducing the aggregate amount allowed by the court in the sum of $320, and allowing the remainder.

The accounting officers followed the action of the Attorney-General and disallowed said $320, and the claimant has been paid the remainder only.

6 V.

The practice of reducing the allowances made to district attorneys for counsel fees by the courts first began about 1878, when Attorney-General Devens issued the following circular:

DEPARTMENT OF JUSTICE,
Washington, ——— —, 1878.

———— ————, Esq.,
United States Attorney, District of ————:

SIR: Your attention is invited to the concluding clause of section 824 of the Revised Statutes of the United States, permitting an allowance not exceeding $30, in addition to the other legal fees of the United States attorney, in proportion to the importance and difficulty of the cause when a conviction is had before a jury on an indictment for crime.

Whenever you have obtained the approval of the court to a special fee under this clause, you will forward with your account of the same to the First Auditor a brief statement of the points and circumstances in each case, which render it one of the importance and difficulty contemplated by the statutes.

Your account, together with this statement, will be submitted by the First Auditor (in such cases as he deems necessary) to the Attorney-General, in order to determine from the means afforded whether such special counsel fees should be allowed in the final settlement.

Very respectfully,

CHAS. DEVENS,
Attorney-General.

Previously to that time such allowances by the court were accepted without alteration.

VI.

The claimant's whole compensation, if said items of counsel fees as allowed by the court were added, would not exceed the maximum of $6,000 in any one year.

CONCLUSION OF LAW.

Upon the foregoing findings of facts the court decides as a conclusion of law that the claimant is entitled to recover the sum of $320.

IV.—OPINION.

RICHARDSON, Ch. J., delivered the opinion of the court:

The claimant was United States district attorney for the eastern district of Arkansas.

In that capacity there were tried by him, before a jury, twenty-two indictments for crimes, in each of which a conviction was had.

Sections 823 and 824 of the Revised Statutes prescribe the compensation to be "taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided for by law."

Among the items enumerated in section 824 is the following:

"When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding $30."

7 The amount of the allowance is thus left discretionary, without specifying by whom the discretion shall be exercised. Very naturally, from the first enactment in 1853, to the present time, it has always been exercised by the judge before whom the causes were tried, because the taxation of costs is an incident of the trial and judgment, and as much within the power of the court as any other judicial duties. The reports abound in cases where the courts have passed upon the allowances of costs without questinn. In the case of the United States vs. Ingersoll (Crabb, 135) it was stated as a general principle that "the allowance of costs to a district attorney is altogether in the jurisdiction of the judge and not within the power of the officers of the Treasury."

In this particular item of allowance there seems to be a special reason why the discretion should be exercised by the court, in this, that the amount allowed is to be "in proportion to the importance and difficulty of the cause," which can be best known to the judge who presided at the trial.

To the claimant, following the uniform practice, the court made allowances, fixing the amount in each cause at $30.

In making his semi-annual accounts to the Attorney-General for settlement at the Treasury Department, as required by Revised Statutes, sections 833, 846, and the act of February 22, 1875, ch. 915 (Supplement to Rev. Stats., 145), the claimant included items of "$30 counsel fee allowed by

court" in each of said twenty-two cases of indictments tried by him where convictions were had. The accounts were duly approved by the court as required by the act of 1875.

The Attorney-General reduced the amount of allowances to $20 each in five cases, $15 each in fourteen cases, and $10 each in three cases, thus disallowing $320 in all. The accounting officers of the Treasury followed the action of the Attorney-General and made the same reductions. The amounts thus deducted from the allowances made by the court have not been paid to the claimant, and he brings this action to recover the same.

The issue raised involves the powers and duties of the Attorney-General and the accounting officers of the Treasury in relation to the allowances and accounts of district attorneys.

On behalf of the defendants the authority of the Attorney-General to make the reductions is claimed under section 368 of the Revised Statutes, which is as follows:

"The Attorney-General shall exercise general supervisory powers over the accounts of district attorneys, marshals, clerks, and other officers of the courts of the United States."

What those supervisory powers are is not defined, and the words, taken by themselves, do not convey a very definite idea. Webster gives the meaning of supervise to be "to overlook, to oversee, to superintend, to inspect." That implies only the duty of seeing to it that all is rightly done and in accordance with previous directions, and not the power of reviewing and altering what has been done by regular authority.

If there be any doubt as to the meaning of a word as used in an act of Congress, we may review other acts on the same subject and learn from them what was really intended by the law-making power, as we did as to the word "vacancy," in Farden's Case (15 C. Cls., 353), affirmed by Supreme Court (99 U. S., 10), and "revenue laws," in Beckwith's Case (16 C. Cls., 262), and of "barred" in McClure's Case (19 C. Cls., 24).

8 The acts previous to the Revised Statutes throw much light on the question now under consideration.

In a general revision made with the paramount object "to revise, simplify, arrange, and consolidate all statutes," the construction of a section will not be changed by such alterations of the language of the former act as were designed to render the provisions more concise. (Moores v. Bunker, 9 Foster, 421.) Section 368 is a reproduction, in more concise language, of the act of June 22, 1870, chapter 150, section 15 (16 Stat. L., 164), which is as follows:

"The supervisory powers now exercised by the Secretary of the Interior over the accounts of the district attorneys, marshals, clerks, and other officers of the courts of the United States, shall be exercised by the Attorney-General, who shall sign all requisitions for the advance or payment of moneys out of the Treasury on certificates or accounts, subject to the same control now exercised on like estimates or accounts by the First Auditor or First Comptroller of the Treasury."

The supervisory powers exercised by the Secretary of the Interior were transferred to him in the first place from the Secretary of the Treasury by the act of March 3, 1849, chapter 108, section 4 (9 Stat. L., 395), in the identical language adopted by the act of 1870 transferring the same to the Attorney-General.

Let us now see what had been the supervisory powers of the Secretary of the Treasury and the Secretary of the Interior, as defined by the statutes.

By the act of March 3, 1791, chapter 22, section 1 (1 Stat. L., 217), it was provided as follows:

"The accounts of the several officers [among whom were district attorneys] for compensation aforesaid, having been previously examined and certified by the judge of the district, shall be passed in the usual manner at, and the amount paid out of, the Treasury of the United States." This was repealed by the act of March 3, 1841, chapter 35, and there was allowed by it "to the attorney of the United States for the district such fees in each State, respectively, as are allowed in the supreme court of the same, and also like compensation for traveling as is allowed to the clerk of the circuit and district courts." No return was required to be made to the Secretary of the Treasury.

The act of March 3, 1841, chapter 35, section 1 (5 Stat. L., 427), made the following provision:

"The fees and emoluments retained by the district attorneys, marshals, and clerks, exclusive of any reasonable compensation for their deputies, to be allowed in their accounts by the courts of the respective districts to which they belong, and after the payment of such necessary office and other expenses as shall be allowed by the Secretary of the Treasury, not to exceed [the amounts specified], the overplus of fees and emoluments to be paid into the public Treasury under such rules and regulations as may be prescribed by the Secretary of the Treasury, subject to the disposition of Congress."

The act of May 18, 1842, chapter 29, item No. 167 (5 Stat. L., 483), was more full and explicit on the subject, as follows:

"Every district attorney, clerk of a district court, clerk of a circuit court, and marshal of the United States, shall, until otherwise directed by law, upon the first days of January and July in each year, commencing with the first day of July next, or within thirty days from and after the days specified, make to the Secretary of the Treasury, in such form as he shall prescribe, a return, in writing, embracing all the fees and emoluments of their respective offices, of every name and character, distinguishing the fees and emoluments received or payable under the bankrupt act from those received or payable for any other service; and in the case of a marshal, further distinguishing the fees and emoluments received or payable for services by himself personally rendered from those received or payable for services rendered by a deputy; and also distinguishing the fees and emoluments so received or payable for services rendered by each deputy,
9 by name, and the proportion of such fees and emoluments which by the terms of his service, each deputy is to receive, and also embracing all the necessary office expenses of such officer, together with the vouchers for the payment of the same, for the half year ending on the said first day of January or July, as the case may be, which return shall be in all cases verified by the oath of the officer making the same. * * *

"And no district attorney shall be allowed by the said Secretary of the Treasury to retain of the fees and emoluments of his said office, for his own personal compensation, over and above his necessary office expenses, the necessary clerk hire included, to be audited and allowed by the proper

accounting officers of the Treasury, a sum exceeding $6,000 per year, and at and after that rate for such time as he shall hold the office. * * * And every such officer shall, with each such return made by him, pay into the Treasury of the United States, or deposit to the credit of the Treasurer thereof, as he may be directed by the Secretary of the Treasury, any surplus of the fees and emoluments of the office which his half-yearly return so made as aforesaid shall show to exist over and above the compensation and allowances hereinbefore authorized to be retained and paid by him.

"And in every case where the return of any such officer shall show that a surplus may exist, the said Secretary of the Treasury shall cause such returns to be carefully examined, and the accounts of disbursements to be regularly audited by the proper officers of his Department, and on account to be opened with such officer in books to be provided for that purpose, and the allowances for personal compensation for each calendar year shall be made from the fees and emoluments of that year, and not otherwise."

The next act bearing upon the subject was that of 1849, already cited, transferring to the Secretary of the Interior the supervisory power of the Secretary of the Treasury.

In 1853, by the act of February 26, chapter 80 (10 Stat. L., 161, 162), an entirely new fee bill was enacted in lieu of the compensation previously allowed. Then first appeared the provision that there might be allowed to a district attorney a counsel fee in proportion to the importance and difficulty of the cause, not exceeding $30, in the same language as is now found in section 824 of the Revised Statutes.

The act of June 27, 1864, chapter 27 (13 Stat. L., 196), contains the following:

"SEC. 2. That no marshal nor district attorney of the United States shall, by reason of the discharge of the duties of his office, now or hereafter required of him by law, or in any case in which the United States shall be bound by the judgment which may be rendered in the same, be allowed to retain out of the fees, charges, and emoluments thereof, whether prescribed by statute or allowed by the court or the judge thereof, a greater maximum compensation than that fixed by the act aforesaid" [the act of 1853, above cited].

Thus we see what was the general character of the supervisory powers of the Secretary of the Interior. They were numerous in details, but it is evident that they did not extend to reviewing and altering the allowances made by the court or judge in the discretionary power conferred by the act of 1853. This is especially apparent from the act of 1864, which classes such allowances with the fees prescribed by statute, which nobody, probably, would contend could be changed and reduced under any supervisory power of the Secretary of the Interior. What power of supervision the Secretary of the Interior had was transferred to the Attorney-General, and in our opinion it extends to seeing that the accounts are in due form, in accordance with the law and regulations; that all receipts are properly credited; that all items of payments and allowances are authorized by law; that nothing is retained beyond the maximum fixed by statute, "and that in every respect the law relating to the same has been fully complied with," and does not include the power of reviewing the discretion of a judge in making allowances and of altering his orders and decrees therein.

There is a material difference between making an allowance under Revised Statutes, section 824, and approving an account under the act of 1875. The allowance of counsel fee under the Revised Statutes, section 824, is a judicial act, which, like other judicial acts, cannot be revised by executive officers, according to the theory of our form of government. (O'Grady's Case, 22 Wall., 641; Beckwith's Case, 16 C. Cls., 262, 263.) The settling of an account when not an incident of a suit at law or in equity, is executive business, and may be revised by different executive officers, even after, as in the case of district attorneys' accounts, it has been passed upon by a judge who does not allow but merely approves the same. (Turner's Case, 19 C. Cls., 635.) In supervising an account, the allowances made by the court are no more subject to revisal than are the fees expressly prescribed by statute. In one case, as in the other, the supervising officer can only see to it that they are charged in conformity to law.

This brings us to the power and duties of the accounting officer of the Treasury in this matter. The act of February 22, 1875, chapter 95, section 1 (Supplement to Rev. Stats., 145), requires district attorneys and others to render their accounts, with the vouchers and items thereof, to a United States circuit or district court, and prove the same, as therein provided, to the satisfaction of the court, and the court is required thereupon to cause to be entered of record an order approving or disapproving the account as may be "according to law and just." Then follows this provision:

"Nothing contained in this act shall be deemed in anywise to diminish or affect the right of revision of accounts to which this act applies by the accounting officers of the Treasury as exercised under the laws now in force."

This means nothing more than that the approval or disapproval by the court shall not be held to be a judicial act, conclusive upon all parties, but shall be regarded merely as a step or process in the executive business of settling accounts, as we held in Turner's Case (19 C. Cls., 629). The right of revision by the accounting officers thus referred to "as exercised under existing laws now in force" is found set forth in Revised Statutes, section 846. After requiring the accounts of district attorneys and others to be certified by a judge and presented to the Treasury Department, it is there enacted that "they shall then be subject to revision upon their merits by said accounting officers, as in the case of other public accounts."

This leaves the powers and duties of the accounting officers of the Treasury as to the accounts of district attorneys precisely the same as they exist in relation to all other accounts adjusted and settled by them; no greater and no less. Those powers and duties are well understood.

The Auditor merely examines and audits accounts, neither allowing nor disallowing the same, certifies balances and transmits the same to the Comptroller for his decision thereon.

The Comptroller decides whether or not the items are authorized by statute, and are legally chargeable. He has no power to review, revise, and alter items expressly allowed by statute, nor items of expenditures or allowances made upon the judgment and discretion of other officers charged with the duty of expending the money or of making the allowances. His duty extends no further than to see that the officers charged with that duty have authorized the expenditures or have made the allowances. His decis-

ion thereon is, by Revised Statutes, section 191, made "conclusive upon the executive branch of the Government, and subject to revision only by Congress or the proper courts."

11 It is the theory, and a wise one, upon which the final adjustment and settlement of accounts in the Treasury Department is founded, that the officers who pass upon them shall be wholly distinct from those who expend the money or incur the liabilities. For the manner in which these latter officers perform the trust imposed upon them they alone are responsible; the Comptroller is only charged with the duty of seeing that they keep within the law. (Longwill's Case, 17 C. Cls., 288; Ridgway's Case, 17 C. Cls., 715; McKnight's Case, 13 C. Cls., 292.)

It was said by the Supreme Court in the United States v. Jones (18 Howard, 92), in reference to the expenditure of money intrusted to the discretion of the head of a Department:

"The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the order of the heads of Departments."

This being so, they certainly have not the burden cast upon them of reversing the judicial acts of the courts, which even the head of a Department can neither revise nor override. (O'Grady v. United States, 22 Wall., 641, and 10 C. Cls., 134.)

It was not until 1878 that the power of reviewing and reducing allowances of counsel fees made to district attorneys by the courts was first assumed and exercised by the Attorney-General and the accounting officers of the Treasury (see Finding V). In our opinion it is not warranted by law.

The uniform practical construction given to the statutes by the courts, the Secretary of the Interior, the Attorney-General, and the accounting officers for twenty-five years immediately following the act of 1853, which first authorized such allowances, lends additional force to the manifest reasons which indicate that Congress intended by that act and Revised Statutes, section 824, to intrust to the courts the discretion of allowing to district attorneys counsel fees in the specified cases tried before them "in proportion to the importance and difficulty of the cause" without review by executive officers, and removes every shadow of doubt on the subject, if any there were. (Stuart v. Laird, 1 Cranch, 299; Edwards, lessee, v. Darby, 12 Wheat., 210; Mrs. Alexander's Case, 12 Wall., 177; Pugh's Case, 99 U. S., 265; Hahn's Case, 14 C. Cls., 318—affirmed 107 U. S., 402; Peabody v. Stark, 16 Wall., 240; Harrison's Case, 20 C. Cls., 126.)

The claimant is entitled to recover the remainder of the allowances made to him by the courts which have not been paid, and judgment will be entered in his favor for $320.

12 V.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 11th day of January, A. D. 1886, judgment was ordered to be entered up as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Charles C. Waters do have

and recover of and from the United States the sum of three hundred and twenty dollars ($320.00).

13 VI.—*Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 11th day of Jan'y, 1886, in favor of claimant, the defendants, by their Attorney-General, on the 25th day of January, 1886, made application for, and give notice of, an appeal to the Supreme Court of the United States.

R. A. HOWARD,
Assistant Attorney-General.

Filed January 25, 1886.

And now, to wit, January 25, 1886, it is ordered that the appeal be allowed as prayed for.

WILLIAM A. RICHARDSON,
Chief Justice.

14 In the Court of Claims.

VII.

CHARLES C. WATERS
vs.
THE UNITED STATES. } No. 14541.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the defendants for allowance of appeal to the Supreme Court of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 9th day of September, 1886.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 1025. The United States, appellant, vs. Charles C. Waters. Court of Claims. Filed September 27, 1886.

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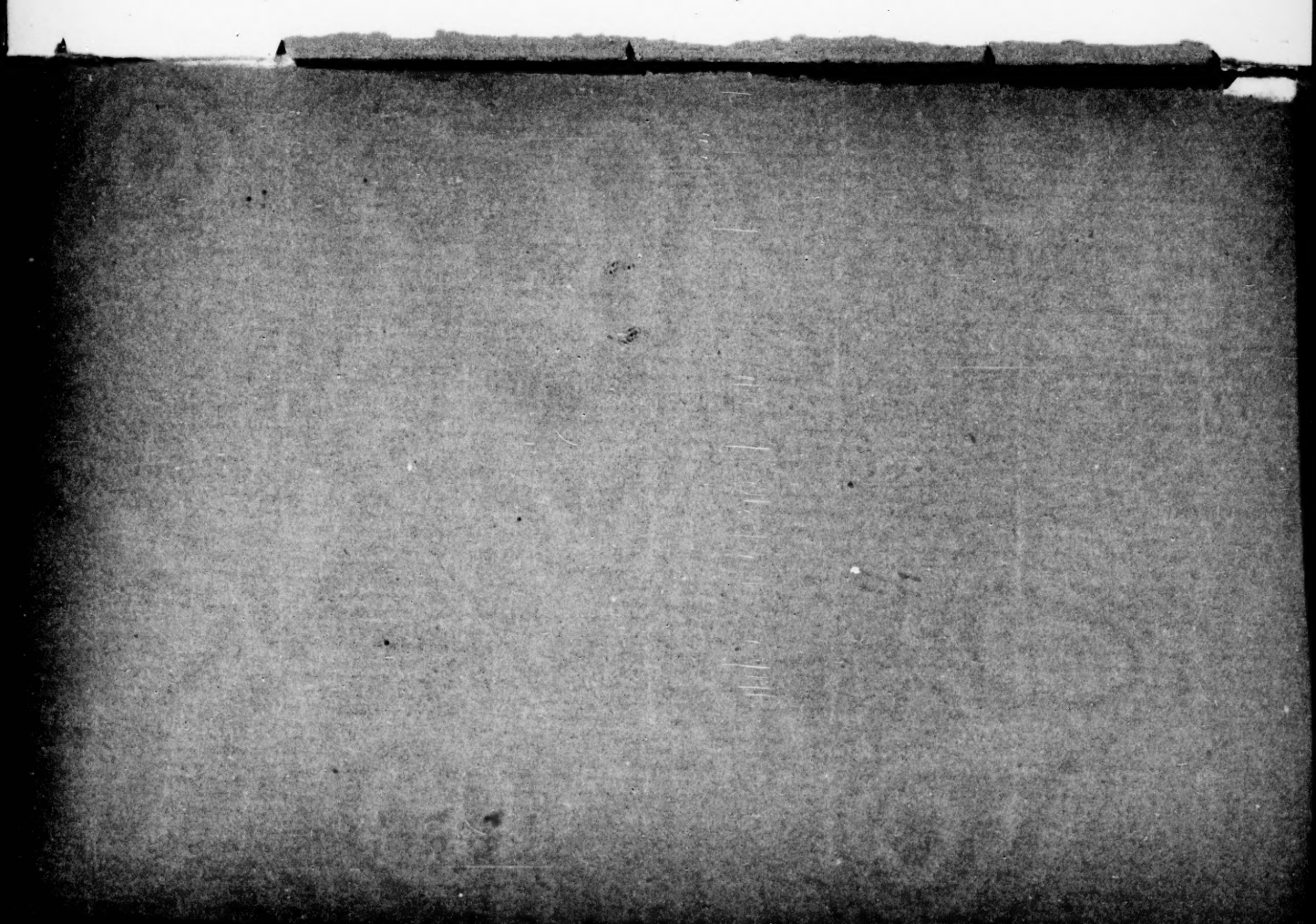
In the Supreme Court of the United States

OCTOBER TERM, 1889.

THE UNITED STATES, APPELLANT,
vs.
CHARLES C. WATERS, APPELLEE. } No. 95.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.



In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES, APPELLANT,
vs.
CHARLES C. WATERS, APPELLEE. } No. 95.

APPEAL FROM THE COURT OF CLAIMS.

BRIEFF OR APPELLANTS.

STATEMENT OF THE CASE.

Charles C. Waters, appellee, was United States district attorney for the eastern district of Arkansas for six years preceding the filing of his petition on February 18, 1885. During that time there were twenty-two indictments for crimes tried by him before juries, and a conviction in each case. The claimant, in his accounts rendered to the

circuit or district court, inserted twenty-two items corresponding to the twenty-two cases referred to, crediting himself with thirty dollars, counsel fee allowed by the court, and the accounts were approved by the court.

These accounts being forwarded to the accounting officers of the Treasury, were by them submitted to the Attorney-General, and he thereupon reduced the items already mentioned, as follows: $10 in five instances, $15 in fourteen, and $20 in three, thus reducing the total of the items by the sum of $320. It is for this sum, disallowed by the accounting officers in accordance with the action of the Attorney-General, that the claimant brought suit. There is no pretense that the claimant's compensation would be raised above the legal maximum of $6,000 by the allowance of the sum sued for.

The court below, holding the right to determine upon these items in question to be in the circuit or district court and not in the Attorney-General, found the claimant entitled to recover the amount sued for, $320, and gave judgment accordingly.

ASSIGNMENT OF ERROR AND BRIEF.

It is submitted by the appellant that the court below erred upon the facts found in its conclusion of law that the appellee was entitled to recover from the United States the sum of $320, or any other amount.

This finding is based upon the idea that the *allowance* by the court of the account in question was conclusive upon the accounting officer of the Treasury Department, and upon the Attorney-General as well.

SUPERVISORY POWERS.

To determine the force and effect of such supposed *allowances*, it is necessary to consider section 368, Revised Statutes, which requires that the Attorney-General shall exercise general supervisory powers over the accounts of district attorneys and other officers there named. In this connection reference is had to section 835, Revised Statutes, which provides that "no district attorney *shall be allowed* by the Attorney-General to retain of the fees and emoluments of his office * * * a sum exceeding $6,000 a year."

Section 841, Revised Statutes, contains a similar provision as to the fees of marshals, and then to turn to the statutes under which they were made, to see what authority was conferred upon the court in that regard. For this purpose the second and third findings of the court below (Rec., pp. 2 and 3) may be considered together. Among other things, it is found that twenty-two items, stated to be counsel fees, of $30 each, were allowed by the United States circuit or district court (Arkansas) to appellee under section 824 upon accounts rendered as required by sections 833, 846, of the Revised Statutes, and the act of February 22, 1875, chapter 95 (Supp. to Rev. Stat., p. 145, sec. 1).

Section 833 directs that "every district attorney, clerk of a district court, clerk of a circuit court, and marshal shall make his semi-annual report to the Attorney-General of all the fees and emoluments of his office," etc. All accounts under this section, and, indeed, under chapter 16 of the Revised Statutes, of which section 833 forms a part, shall under section 846 be examined and *certified* by the

district judge of the district for which attorneys were appointed, before the accounts shall be presented to the accounting officers of the Treasury Department for settlement. *The accounts shall* then be *subject to revision* upon their *merits* by said accounting officers, as in case of other public accounts.

Section 1 of the act of February 22, 1875 (Supp. Rev. Stat., p. 145, sec. 1), requires that before any bill of *cost* shall be taxed or any account payable out of the money of the United States shall be allowed to any officer of the Treasury, in favor of district attorneys, clerks, or marshals, the party claiming such account shall render the same with vouchers and items thereof to a United States circuit or district court, and in the presence and in the manner therein required prove the same; * * * and the court shall thereupon cause to be entered of record the order *approving* or *disapproving* the same, as may be according to law and just. The last clause of this section distinctly provides that nothing in the act shall be deemed in any wise to diminish or effect the *right of revision* of accounts to which this section applies by the accounting officers of the Treasury as exercised under the laws now in force (sec. 846, Rev. Stat.).

Thus it is seen that in the one case the accounts shall be examined and *certified* by the district judge, and in the other case they shall be *approved* or *disapproved* by the circuit or district court. But in either case they shall be subject to revision upon their *merits* by the accounting officers of the Treasury.

There seems to be nothing in the language of the acts "*certified by the district judge*," or "*approved*" by a United

States circuit or district court, to indicate that Congress intended to make such certification or approval a final adjudication of the matter, and to make the payment by the accounting officers of the Treasury Department imperative.

The learned court below, in support of the position taken by it, cited the case of the *United States* vs. *Ingersoll* (Crabb, p. 135), in which the court held:

> The allowance of cost to a district attorney is altogether in the jurisdiction of the judge, and not within the power of the officers of the Treasury.

The court further says:

> How does his claim for compensation stand in this view of the service? The act of Congress of the 24th September, 1789 (sect. 35, 1 Story's Laws, 67), enacts that "there shall be appointed in each district a meet person, learned in the law, to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute, *in such district*, all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the Supreme Court (which then was held in this city), in the district in which that court shall be holden," and "he shall receive, as a compensation for his services, such fees as shall be taxed therefor, in the respective courts before which the suits or prosecution shall be." Now, it is very clear, and has always been so understood, that for all the duties and services imposed upon and performed by a district attorney under the directions of this act, his fees, taxed as aforesaid, are the only compensation he can claim from the United States (Ibid., p. 171).

From this extract from the statute then in force it will

be seen that Congress has materially changed the law upon that subject.

The allowance then to the district attorney by the court was a final disposition of the question. Unlike section 846, it did not provide that these accounts, after having been certified by the court, should be subject to revision upon their merits by the accounting officers of the Treasury.

In *United States* v. *D. H. Ralston*, Judge Hughes, of the district court for the western district of Virginia, said (First Comptroller's Decisions (Lawrence), 1883, vol. 4, p. 508):

> Before dealing with the items which constitute the sum in dispute, it may be remarked that the accounting officers of the Treasury, under the direction of the Comptroller, are undoubtedly empowered to revise the accounts of the district attorneys, marshals, and clerks of the courts of the United States, and to reject items in these accounts that have been audited and passed by the district judges of the United States. (Act Febraary 22, 1875, 18 Stat., 333.) In passing upon the accounts of these officers, the judges act merely in a ministerial capacity. Their allowances of such accounts are not judicial judgments, reversible only on judicial appeal. They are but little more than *certificates* of the *regularity and genuineness* of the accounts and vouchers, and are made by express law (sec. 846, Rev. Stat.), "*subject to revision upon their merits*," by the appropriate accounting officers of the Treasury. This provision of law is not only wise and proper in itself, but benevolent to the judges, who are thus relieved of a very irksome responsibility and labor, which bring them into unpleasant antagonism with the officers of their courts.

DISCRETION OF THE ATTORNEY-GENERAL.

The foregoing is presented to meet the argument of the court below upon the revisory powers of the Attorney-General and the accounting officers of the Treasury Department; but the real question in this case is, in whom has the law vested the discretion of allowing to district attorneys additional compensation under the last paragraph of section 824 Revised Statutes.

It is supposed that in this matter of allowing extra pay this discretion was meant to be given the Attorney-General, not the judge or the accounting officers, and for the following reasons:

(1) Because the statutes concerning accounts have nothing to do with the matter. It is not a question of accounting, but of fixing compensation. That the compensation was to be paid on the contingency of a conviction obtained makes no difference in the principle; that the amount is small makes no difference. The act of deciding to allow a man $20 or $30 for his labor in a difficult case is the same in principle as deciding to allow a special attorney a very much larger amount for trying another case.

(2) The Attorney-General is a chief of a Department into which the district attorneys have been drawn by recent legislation as his subordinates. They work under his direction. (R. S., 362.) They must render him an account of their proceedings whenever and however he may direct. If Congress delegated any discretionary power to increase their compensation according to the importance and difficulty of their work, it would be most

appropriate and natural to give that discretion to their official superior.

(3) Because the Attorney-General has been given express authority in all similar and kindred cases of fixing compensation. He is even given authority, when their work is difficult and important, to appoint assistants to them and fix the compensation of these assistants. (See R. S., 363, 365.) And because other heads of Departments are given the same discretion when Congress delegates it in connection with those under their direction.

(4) Because in analogous cases Congress has given the discretion to the directing executive power, in express derogation of the power of the court to certify a proper compensation. (R. S., 827.) When acting under the direction of the Secretary of the Treasury, as in that section contemplated, the district attorney is *pro tanto* a subordinate of the Secretary of the Treasury, and the Secretary is given by that section the discretion to fix his compensation.

(5) Because the fixing of compensation is not a judicial but an executive or legislative act. Courts sometimes fix it where all parties are private persons, but the analogy soon disappears when officials to be paid under the direction of Congress, out of a national treasury, are concerned.

(6) The accounting officers of the Treasury could never have been given this discretion in fixing an additional allowance, for, from the nature of the case, they know nothing about the difficulty and importance of the work done by a district attorney, and because fixing compensa-

tion for services is foreign to their ordinary business. The discretion is of a kind they never exercise, and moreover, when exercised by another, they can not alter or amend what is done.

(7) The reasoning of the court from the old statutes in force when the Secretary of the Treasury or Secretary of the Interior was, as the court supposes, in the place and stead of the Attorney-General in his relation to the district attorneys, is wholly erroneous, because the creation of the Department of Justice made an entire new order of things. The district attorneys never had any such chief as they now have, and the Secretary of the Interior, not being a law officer, had no such relations with them as the Attorney-General has. But the *fundamental error of the court below is in mistaking* the act of *fixing the compensation* for the *act of accounting* or ascertaining the correctness of a bill rendered.

The Attorney-General and district attorney are both law officers of the Government, both of the same profession, and both connected with the courts of the country—one the superior and the other the inferior. There is but one superior and many inferior. The law deemed it wise to have one system, one chief, one general control. With a view to harmony in the matter of special fees above referred to as well as other matters, the law withheld from the circuit and district courts the power to *allow* such fees as were payable out of the Treasury and not out of a fund under the court's control, presumably for the reason that among the various judges different opinions would probably prevail, different conclusions be reached, and, as a

consequence, different amounts allowed. To avoid these results and produce uniformity in such allowances, the power was wisely conferred upon the Attorney-General, and in the exercise of that power he required, as far back as 1878, each district attorney, who claimed such special counsel fees and had procured the approval of the court, to forward with his account a brief statement of the points and circumstances in each case, which render it one of the importance and difficulty contemplated by the statute, to the end that he could determine whether such fees should be allowed in the final settlement, and by that means to establish a uniform rule governing such allowances.

It can not be supposed that the approval of such accounts by the court, circuit or district, was intended to sweep away this power conferred upon the Attorney-General.

In making the reductions of some of the 830 items the Attorney-General had before him the report which the district attorney was required to make under section 833 of Revised Statutes; he also had the account, together "with the vouchers and items thereof" and the proofs to sustain the same, as required by the act February 22, 1875 (Supp. to Rev. Stat., 145), which had been submitted to and approved by the circuit or district court (Rec., pp. 4, 5.) And upon mature consideration thereof, and of the "importance and difficulty" of the cases tried, for which the district attorney asked the additional allowance, and to produce uniformity in such allowances in the various judicial districts of the country and in the exercise of his official discretion, he allowed some of those items and reduced others.

It was simply an additional allowance, dependent upon the conditions contained in the section (824) last cited, *not* a taxation of *cost*—"an incident of the trial and judgment, and as much within the power of the court as any other judicial duties," as the court below held (Rec., p. 4).

The approval by the circuit or district court was simply a verification of the account, vouchers, items, and proofs upon which the Attorney-General was to act.

For these and other reasons apparent upon the face of the record, it is respectfully submitted that the judgment should be reversed and the petition dismissed.

B. WILSON,
Assistant Attorney.

NOVEMBER, 1889.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 95.

THE UNITED STATES, Appellant,

vs.

CHARLES C. WATERS, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLEE.

CHARLES C. LANCASTER,
Counsel for Appellee.

TAYLOR & CO., 13TH AND F N.W.

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BRIEF OF APPELLEE.

The facts in the above-entitled cause are fully set forth in the record, and need not be repeated here. The appellee relies on the exhaustive opinion of the chief justice of the court below, and deems it sufficient to cause this appeal to be dismissed. The attention of this Court is invited to an important and controlling point not specifically noticed in the above opinion.

No existing statute gives the Attorney General the power or opportunity to pass on the allowance of counsel fees, for the reason that the accounts of district attorneys are required by law to be forwarded to the proper accounting officers of the Treasury for audit, and not to the Attorney General. The act of February 22, 1875, chapter 95, section 1, Sup. Rev. Stats., 145, provides "that before any bill of costs shall be taxed by any judge, or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury in favor of clerks, marshals, or *district attorneys*, the party claiming such account shall render the same, with the vouchers and items thereof, to a

United States circuit or district court, and, in the presence of the district attorney, or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated, and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account as may be according to law and just. * * * *And it shall be the duty of the clerk to forward the original accounts and vouchers of its officers above specified, when approved, to the proper accounting officers of the Treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all times.* Nothing contained in this act shall be deemed in anywise to diminish or affect the right or revision of the accounts to which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force." (See also section 846, Revised Statutes.)

The accounts referred to are the fee accounts where the counsel fees are charged, and not the emolument accounts referred to in the act of May 18, 1842 (5 Stats. at Large, 483). By the act of February 22, 1875, aforesaid, it is made the duty of the accounting officers to audit and settle the accounts of district attorneys, so that in the settlement of these accounts it is nowhere provided that they shall first be revised by the Attorney General. It is thus made clear that it was not the intention of the law-making power to give the Attorney General any jurisdiction over these fee accounts from the act of presentation to the court to the final settlement by the accounting officers of the Treasury. Such being the case, the intention of Congress is free from doubt that the allowance of counsel fees was to be made by the court when it enacted the following clause of section 824, Rev. Stats.:

"When an indictment for crime is tried before a jury, and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee,

in proportion to the importance and difficulty of the cause, not exceeding $30."

The statute evidently makes the court the judge of the "*importance* and *difficulty* of the cause," and the allowance rests with the court, and is final.

The statute imposes a discretionary power upon the court in this instance, and when once exercised cannot be revised or corrected by the Attorney General or accounting officers of the Treasury, but is conclusive.

The reviewing officer or bureau has no means of knowing the importance of the case or the amount of service rendered, as contemplated by the statute.

Other examples may be cited of the limitation of the revisory power of the accounting officers.

Section 846 of the Revised Statutes provides that no "accounts of fees and costs paid (by the United States marshal) to any witness or juror, upon the order of any judge or commissioner, shall be so examined as to charge any marshal for any erroneous taxation of such fees and costs."

The same section also provides that "where the ministerial officers of the United States have or shall incur extraordinary expenses in executing the laws thereof, the payment of which is not specially provided for, the President of the United States is authorized to allow the payment thereof, under the special taxation of the district or circuit court in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the Judiciary."

There is no authority on the part of the accounting officers to revise the action of the President, as he is made the judge of the matter.

Judge Blodgett, of the district court of the United States for the northern district of Illinois, having this question of the allowance of counsel fees before him, decided that the *allowance by the court was a judicial act.*

Tuthill *vs.* United States, 38 Fed. Rep., 538.

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